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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
)
Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)
)
and)
)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)
800 MHz SMR)

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PP Docket No. 93-253

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Making³ in this proceeding may be unable to withstand judicial scrutiny in view of *Adarand*. Accordingly, to reduce the risk of legal challenge and prevent resultant delays in the implementation of wide-area SMR service, Motorola urges the Commission to revise its proposals in a manner that mirrors more closely the preferences proposed for use in the 900 MHz SMR context.

I. Background

In accordance with Congress's mandate,⁴ the Commission has proposed a number of provisions intended to ensure that "designated entities" -- small businesses, rural telephone companies, and businesses owned by members of minority groups and women -- will have an opportunity to participate in the provision of 800 MHz and 900 MHz SMR operations. After the Commission had already advanced its proposals in both the 800 MHz and 900 MHz SMR proceedings, the Supreme Court issued its opinion in *Adarand*, in which it held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny"⁵ rather than the intermediate scrutiny standard previously applied to federal programs. Under *Adarand*, to pass

³ In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR, FCC 94-271, 59 Fed. Reg. 60,111 (Nov. 22, 1994) (Further Notice of Proposed Rule Making) [hereinafter *800 MHz Further Notice*].

⁴ See 47 U.S.C. § 309(j)(4)(D).

⁵ *Adarand*, 115 S.Ct. at 2113.

constitutional muster, any federal program that makes a distinction on the basis of race must serve a compelling governmental interest and must be narrowly tailored to further that interest.⁶

II. To Prevent Further Delays in 800 MHz SMR Licensing and Implementation of Wide-Area SMR Service, the Commission Should Avoid Preferences That Are Likely To Result in Legal Challenges.

As mentioned, the Bureau has solicited comment on how the *Adarand* decision affects the Commission's designated entity proposals for the 800 MHz SMR service.⁷ Because the specific proposals advanced by the Commission for the 800 MHz SMR auction contain special benefits available only to women- and minority-owned entities,⁸ *Adarand* requires the Commission to be able to show that at least the race-based distinctions serve a compelling governmental interest and are narrowly directed toward

⁶ *Id.*

⁷ In a separate Public Notice, the Commission has also solicited comment on the impact of *Adarand* in the 900 MHz SMR context.

⁸ In the 800 MHz SMR context, the Commission proposed to give businesses owned by women and minorities a bidding credit of an undetermined amount. In addition, the Commission sought comment as to whether it should: (1) expand eligibility for installment payments to designated entities other than small businesses; (2) offer a reduction in upfront payments for any class of designated entities for any licenses auctioned in the 800 MHz SMR service; and (3) designate the "lower 80" 800 MHz SMR channels as an entrepreneurs' block set aside for bidding solely by qualifying entities. *800 MHz Further Notice* at ¶¶ 90-105.

redressing that interest. To satisfy this requirement, the government must have a "strong basis in evidence for its conclusion that remedial action [is] necessary."⁹

With respect to 800 MHz trunked SMR service, there is no evidence of discrimination in the granting of licenses. On the contrary, the manner in which all existing 800 MHz SMR licenses were issued -- by lottery -- tends to mitigate against any discrimination. In addition, available data indicate that the cost of acquiring, constructing, and operating 800 MHz trunked SMR systems is extremely low compared to broadband PCS system costs.¹⁰

Motorola estimates the cost of constructing a basic five-channel, trunked SMR system at 800 MHz to be \$50,000 -- or \$10,000 per channel. Wide-area 800 MHz SMR systems, on the other hand, have a feature-rich architecture and are designed principally for very large subscriber bases and extensive geographic coverage. The infrastructure for such systems, which include paging, cellular, and dispatch, may today approach \$10 million. Prospectively, however, the marketplace will develop alternative product portfolios with a range of costs and capabilities to accommodate the spectrum capacity and the range of coverage and market requirements of wide-area licensees. These alternative portfolios have not yet emerged because important

⁹ Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (quotations omitted).

¹⁰ Initial year expenses alone for an MTA broadband PCS system are estimated to be in the range of \$100 million. See Comments of Motorola, Inc., PR Docket No. 89-553, at 3, 6 (filed May 24, 1995).

regulatory variables, such as the size of the spectrum blocks (number of channels, contiguous or non-contiguous) that wide-area licensees will hold, as well as the size of coverage areas (MTA, BTA, BEA) have yet to be decided by the Commission.

As recognized by the Commission in the 900 MHz SMR context, lower capital outlay costs strongly support the inference that the service in question presents fewer barriers to entry by designated entities.¹¹ Largely in view of this fact, the Commission proposed the following preferential measures for use in the 900 MHz SMR auctions: (1) to offer all eligible small businesses, including those owned by women, minorities and rural telephone companies, a 10 percent bidding credit on any of the 10-channel blocks within each MTA; (2) to adopt an installment payment option and reduced down payment for all small businesses; and (3) to limit eligibility for the foregoing preferences to small businesses with less than \$3 million in average gross revenues for the preceding three years.¹² The Commission concluded that these

¹¹ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Implementation of Sections 3(n) and 332 of the Communications Act, FCC 95-159, at ¶¶ 20, 136, (released April 17, 1995) (Second Report and Order and Second Further Notice of Proposed Rulemaking). The estimated cost of deploying a single-site 900 MHz SMR system is \$100,000 to \$200,000 -- or somewhere between \$10,000 to \$20,000 per channel. The estimated cost of constructing a 900 MHz SMR system adequate to provide service throughout an entire MTA is somewhere around \$2 million. See Comments of Motorola, Inc., PR Docket No. 89-553, at 3, 6 (filed May 24, 1995).

¹² *Id.* at ¶¶ 129-147.

proposals will ensure ample opportunity for participation by designated entities. Accordingly, it explicitly declined to establish a separate entrepreneurs' block available only to designated entities, to develop separate eligibility criteria for minority- and women-owned entities that do not meet the small business size standards, or to establish an enhanced bidding credit or other measures for small businesses owned by minorities and/or women.¹³

Significantly, the record generated in the 900 MHz SMR proceeding supports the Commission's determination that its proposals will provide opportunities for participation by designated entities in the 900 MHz SMR service, as well as its finding that additional preferences are unnecessary.¹⁴ Moreover, because the 900 MHz SMR preferences avoid race- or gender-based distinctions, they do not present a significant threat of legal challenge in light of *Adarand*.

Based on the comparatively low capital outlay costs for 800 MHz SMR systems as well as the fact that the 800 MHz SMR service does not have an evidentiary history likely to justify race- or gender-conscious distinctions under the strict scrutiny analysis, Motorola urges the Commission to adopt designated entity provisions for the 800 MHz SMR auction that are more closely patterned after the proposals advanced in the 900 MHz SMR context. Revising the proposals in this manner will serve the public interest

¹³ *Id.* at ¶ 147.

¹⁴ *See* Reply Comments of Motorola, Inc., PR Docket No. 89-553, at 4 & n.7.

by ensuring that all designated entities -- including minority- and women-controlled firms that qualify as small businesses -- are afforded meaningful opportunities to participate in the provision of 800 MHz SMR service. At the same time, the Commission will avoid legal challenges that are likely to delay seriously 800 MHz SMR licensing and the implementation of wide-area SMR service.

III. Conclusion

For the reasons set forth above, Motorola urges the Commission to adopt provisions for participation by designated entities in the 800 MHz SMR service that are more closely patterned after the designated entity preferences proposed for use in the 900 MHz SMR auctions. These types of procedures will fulfill Congress's mandate that the Commission ensure that small businesses and businesses owned by women and minorities are given meaningful opportunities to participate in the provision of 800 MHz SMR service while at the same time minimizing the likelihood of legal challenges and consequent delays in the implementation of 800 MHz SMR offerings.

Respectfully submitted,

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August 4, 1995

CERTIFICATE OF SERVICE

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